

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**N.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chicago, IL, Employer**

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**Docket No. 08-2128  
Issued: May 8, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 29, 2008 appellant filed a timely appeal of an October 22, 2007 merit decision of the Office of Workers' Compensation Programs granting him a schedule award, and a May 14, 2008 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the schedule award decision.

**ISSUES**

The issues are: (1) whether appellant has more than a two percent impairment of his left upper extremity, for which he received a schedule award; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

Appellant, a 46-year-old clerk, filed a traumatic injury claim on November 15, 2005 alleging that he sustained a left elbow injury on that date while picking up a mail tub. The Office accepted the claim for flexor tendinitis of the left elbow, and approved left elbow surgery involving a revision of the ulnar nerve.

On July 23, 2007 appellant requested a schedule award. In a report dated July 31, 2007, his treating physician, Dr. Daniel C. Newman, a Board-certified orthopedic surgeon, found that appellant had paresthesias and numbness in the ulnar nerve distribution of the left upper extremity extending from the elbow to the tip of the fourth and fifth digits, for which he wore a wrist brace. His examination revealed no other objective findings.<sup>1</sup> Dr. Newman opined that appellant had a seven percent permanent impairment of the left upper extremity, pursuant to Table 16-15 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>2</sup> due to decreased sensation of the ulnar nerve, and that he reached maximum medical improvement in October 2006.

The Office forwarded the case record, together with a statement of accepted facts, to the district medical adviser for review and an impairment rating. In a report dated August 24, 2007, the medical adviser found that appellant had a two percent impairment of his left upper extremity. Based on Dr. Newman's examination findings, which reflected numbness in the ulnar nerve distribution in the left forearm and hand, he stated that appellant had a Grade 4 sensory deficit under Table 16-10 at page 482 of the A.M.A., *Guides*, which corresponds to a 1 to 25 percent sensory deficit. Applying Table 16-15 at page 492, which provides that the maximum sensory deficit for the ulnar nerve is seven percent, the medical adviser concluded that appellant had a two percent left upper extremity impairment. He opined that the date of maximum medical improvement was October 1, 2006.

By decision dated October 22, 2007, the Office granted appellant a schedule award for a two percent permanent impairment of his left upper extremity. The period of the award was from October 1 to November 13, 2006. The Office found that the date of maximum medical improvement was October 1, 2006.

On April 30, 2008 appellant requested reconsideration of the October 22, 2007 schedule award decision. He contended that he had greater impairment because he lost the ability to accrue annual leave and sick leave or to invest in his Thrift Savings Plan from November 11, 2005 through October 1, 2006. Appellant also stated that he was severely depressed due to his medical condition.

By decision dated May 14, 2008, the Office denied appellant's request for reconsideration, on the grounds that he had not raised a substantial legal question or submitted new and relevant evidence warranting further merit review.

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<sup>1</sup> Appellant had full range of motion, with normal flexion, extension and pronation; no elbow pain; no ankylosis or atrophy; and no grip strength weakness. In prior reports, Dr. Newman noted treating appellant with trigger point injections. No surgery was performed until April 28, 2006 for a left ulnar nerve transposition.

<sup>2</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001).

### **LEGAL PRECEDENT -- ISSUE 1**

The schedule award provision of the Federal Employees' Compensation Act<sup>3</sup> and its implementing regulations<sup>4</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>5</sup>

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the Office medical adviser providing rationale for the percentage of impairment specified.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the medical evidence of record does not establish that appellant has more than a two percent impairment of his left upper extremity.

In a July 31, 2007 report, Dr. Newman provided a detailed description of the results of his physical examination of appellant's left upper extremity. He found that appellant had paresthesias and numbness in the ulnar nerve distribution of the left upper extremity, extending from the elbow to the tip of the fourth and fifth digits, for which he wore a wrist brace. However, Dr. Newman reported that there were no other objective findings to support loss of range of motion or strength. He concluded that appellant had a seven percent impairment of the left upper extremity, under Table 16-15 of the A.M.A., *Guides*, due to decreased sensation of the ulnar nerve of his nondominant arm. Dr. Newman also advised that appellant reached maximum medical improvement in October 2006. The Board notes, however, that Dr. Newman did not properly apply the A.M.A., *Guides* in making his impairment rating. Table 16-15, as cited in his July 31, 2007 report, provides a rating protocol for sensory deficit or pain by specifying the maximum impairment for major peripheral nerves. Tables 16-15 provide a maximum of seven percent impairment for the ulnar nerve below the forearm. Dr. Newman failed to then apply Table 16-10 to grade the extent of sensory loss.

The Office medical adviser, relying on Dr. Newman's findings, concluded that appellant had two percent permanent impairment of the left upper extremity. In an August 24, 2007 report, he stated that, due to demonstrated numbness in the ulnar nerve distribution in the left

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<sup>3</sup> 5 U.S.C. § 8107(a)-(c).

<sup>4</sup> 20 C.F.R. § 10.404.

<sup>5</sup> See *Mark A. Holloway*, 55 ECAB 321(2004).

<sup>6</sup> See *Thomas J. Fragale*, 55 ECAB 619 (2004); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

forearm and hand, appellant qualified for Grade 4 sensory deficit under Table 16-10 at page 482 of the A.M.A., *Guides*, which corresponds to a 25 percent sensory deficit. Applying Table 16-15 at page 492, which provides that the maximum sensory deficit for the ulnar nerve is seven percent, the medical adviser found that appellant had a two percent left upper extremity impairment (.25 x 7 was = 1.75, rounded up to 2). He further opined that the date of maximum medical improvement was October 1, 2006. The Board finds that the Office medical adviser explained the basis of his calculation and properly applied the A.M.A., *Guides* to Dr. Newman's findings to determine appellant's left upper extremity impairment.<sup>7</sup> His August 24, 2007 report establishes that appellant has no more than a two percent left upper extremity impairment.

The Board finds that appellant has no more than a two percent impairment of his left upper extremity.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Act,<sup>8</sup> the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>9</sup> To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>10</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>11</sup> The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

Appellant's April 30, 2008 request for reconsideration neither alleged, nor demonstrated, that the Office erroneously applied or interpreted a specific point of law. Additionally, he did not advance a relevant legal argument not previously considered by the Office. Consequently,

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<sup>7</sup> The Board notes that Dr. Newman incorrectly found that appellant had a seven percent impairment of his left upper extremity under Table 16-5 of the A.M.A., *Guides*. He apparently failed to utilize Table 16-10, page 482 of the A.M.A., *Guides*, to grade the severity of appellant's sensory deficit, before multiplying the grade of severity by the appropriate maximum upper extremity impairment (seven percent).

<sup>8</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.606(b)(2).

<sup>10</sup> *Id.* at § 10.607(a).

<sup>11</sup> *Id.* at § 10.608(b).

<sup>12</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of his request for reconsideration, appellant submitted a statement contending that he was entitled to an increased schedule award. He contended that he was entitled to a greater award because he lost the ability to accrue annual leave and sick leave and to invest in his Thrift Savings Plan from November 11, 2005 through October 1, 2006; and that he was severely depressed due to his medical condition. However, he did not provide any medical evidence supporting an increased schedule award. The contentions appellant made would not support an increased schedule award, even if substantiated. Therefore, the Office correctly found that appellant failed to submit relevant and pertinent new evidence not previously considered by the Office.<sup>13</sup>

The Board finds that the Office properly determined that appellant was not entitled to a review of the merits of his claim as it relates to the degree of his impairment, pursuant to any of the three requirements under section 10.606(b)(2). Therefore, the Office properly denied his April 30, 2008 request for reconsideration.<sup>14</sup>

### **CONCLUSION**

The Board finds that appellant has no greater than a two percent left upper extremity impairment, for which he received a schedule award. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

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<sup>13</sup> See *Susan A. Filkins*, 57 ECAB 630 (2006).

<sup>14</sup> The Board notes that its ruling on the first issue effectively grants appellant's request for reconsideration of the issue of the date of maximum medical improvement.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 14, 2008 and October 22, 2007 are affirmed.

Issued: May 8, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board